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In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, ET AL., APPELLANTS

v.

SENATOR MITCH MCCONNELL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES EMILY ECHOLS, ET AL., FOR SUMMARY AFFIRMANCE

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

MALCOLM L. STEWART
GREGORY G. GARRE
Assistants to the Solicitor General

DOUGLAS N. LETTER
JAMES J. GILLIGAN
MICHAEL S. RAAB
DANA J. MARTIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

LAWRENCE H. NORTON
General Counsel

RICHARD B. BADER
Associate General Counsel

STEPHEN E. HERSHKOWITZ
DAVID KOLKER
Assistant General Counsels
Federal Election Commission
Washington, D.C. 20463

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Section 318 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 109, prohibits any person who is less than 18 years old from making a contribution to a candidate for federal office or to a committee of a political party. Appellees Emily Echols, et al., have moved for summary affirmance of the three-judge district court's holding in this case that Section 318 is unconstitutional. That motion should be denied. In light of minors' sharply reduced rights of political participation and control over property, and the government's compelling interest in preventing circumvention of valid existing limits on adult campaign contributions, Section 318 is constitutional. In any event, summary affirmance is inappropriate where, as here, a lower court has declared a provision of an Act of Congress to be invalid.

A. The Constitutional And Other Legal Rights Of Minors Are Substantially More Limited Than Those Of Adults

Appellees' legal analysis is premised on the view that minors "possess the same constitutional rights and liberties as adults, even if, in certain circumstances, such as the special case of public schools, the contours of those rights vary slightly from the rights of their adult counterparts." Mot. to Aff. 7. That contention reflects a profound misunderstanding of the legal and constitutional status of minors. "Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will." *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 654 (1995). In a host of circumstances, minors are routinely barred from activities in which adults would have a constitutional right to engage.

1. The most obvious and relevant example is voting. The Twenty-Sixth Amendment provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. Amend. XXVI, § 1. That constitutional provision distinguishes on its face between minors and adults, and it unmistakably implies that persons *less* than 18 years old *may* be denied the right to vote on the basis of age. In fact, "[n]o State has lowered its voting age below 18." *Thompson* v. *Oklahoma*, 487 U.S. 815, 839 (1988) (Appendix A to Opinion of Stevens, J.). The unquestioned validity of that age-based distinction is especially significant in view of the fundamental nature of the right to vote. See *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886) (right to vote is "a fundamental political right, because preservative of all rights"); *Reynolds* v. *Sims*, 377 U.S. 533, 561-562 (1964) ("the right of

suffrage is a fundamental matter in a free and democratic society").[1]

2. It is likewise well-established that—even outside the distinctive environment of the public schools (see Mot. to Aff. 7, 10 n.8)—the First Amendment rights of minors are not coextensive with those of adults. In *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), for example, this Court upheld the conviction of an adult who had allowed her minor ward to sell religious tracts on a public street in violation of a Massachusetts child labor statute. The Court recognized that "a statute or ordinance identical in terms * * *, except that it is applicable to adults or all persons generally, would be invalid." *Id.* at 167. The Court emphasized, however, that "the mere fact a state could not wholly prohibit this form of adult activity * * * does not mean it cannot do so for children." *Id.* at 168. It is similarly clear that minors may be prohibited from acquiring some (*e.g.*, sexually oriented) communicative materials that would be constitutionally protected if disseminated to adults. See, *e.g.*, *Ginsberg* v. *New York*, 390 U.S. 629, 636-637 (1968).

3. Both when the First Amendment was adopted and at the present time, minors have been subject to substantial restrictions on their ability to enter into binding contracts and to dispose of property. "The common law fixed the age of twenty-one as the age at which both men and women

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[1] By the same token, minors are uniformly precluded from jury service in this country, see *Thompson*, 487 U.S. at 840 (Appendix B to Opinion of Stevens, J.) ("In no State may anyone below the age of 18 serve on a jury."); 28 U.S.C. 1865(b)(1) (limiting jury service in the federal courts to citizens who are at least 18 years old), despite the fact that, "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process," *Powers* v. *Ohio*, 499 U.S. 400, 407 (1991). Minors also generally lack legal capacity to sue in court, and indeed appellees' suit was filed on their behalf by next friends. See Per Curiam op. 1 (caption).

achieve full capacity to contract," though the age of majority has in virtually all States been lowered to 18. Restatement (Second) of Contracts § 14 cmt. a, at 37 (1981). It also remains the general rule that "[a] minor does not have capacity to make a gift." Restatement (Third) of Property, Wills and Other Donative Transfers § 8.2(b), at 137 (2003).[2] Section 318's ban on contributions to candidates and political parties is thus consistent with longstanding rules governing the economic activities of minors.

B. Section 318 Serves To Prevent Evasion By Adults Of BCRA's Limits On Individual Contributions To Candidates And Political Parties

Section 318 was added to BCRA in order "to prevent evasion of the contribution limits in the law." 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (Sen. McCain). Senator McCain explained that, under existing law, "wealthy individuals are easily circumventing contribution limits to both political candidates and parties by directing their children's contributions." *Ibid.* This Court has repeatedly sustained statutory limits on the financing of political campaigns based on similar anti-circumvention rationales. See, *e.g.*, *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("[A]ll members of the Court agree that circumvention is a valid theory of corruption."); *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 198-199 (1981) (plurality opinion); *id.* at 203 (Blackmun, J., concurring); *Buckley* v. *Valeo*,

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[2] The Restatement further explains that "[a] purported gift made by a minor is voidable, not void. Before reaching majority, the minor may disaffirm the gift." Restatement (Third) of Property, Wills and Other Donative Transfers § 8.2(b), at 137 (2003). Under the logic of that rule, a minor who contributed money to a candidate for federal office might retain the right to "disaffirm" the contribution and to insist upon the return of the funds at any time before he reached majority if (for example) he became dissatisfied with the candidate's performance during the campaign or in office.

424 U.S. 1, 38 (1976) (upholding overall annual contribution limit of $25,000).

The district court's holding that Section 318 is unconstitutional was based in large part on the government's inability to identify a substantial number of specific instances in which adults were actually found to have circumvented limits on their own contributions by using minor children as surrogates. See Henderson op. 329; Leon op. 111; Kollar-Kotelly op. 612-613. Appellees argue in addition that any danger of circumvention is adequately addressed by the pre-existing statutory ban on making contributions in the name of another. Mot. to Aff. 15; see Henderson op. 330. Those contentions provide no basis for invalidating Section 318.

1. In assessing the constitutionality of campaign contribution limits and provisions designed to prevent the circumvention of those limits, this Court has consistently declined to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 210 (1982). In *Buckley*, for example, the Court assumed "that most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court nevertheless sustained the challenged $1000 limit on individual contributions to candidates for federal office, explaining that Congress was entitled to conclude that "the opportunity for abuse inherent in the process of raising large monetary contributions [should] be eliminated." *Id.* at 30. This Court has also squarely rejected the contention that the statutory ban on "earmarking" contributions represents the full extent of Congress's authority to combat circumvention of contribution limits. See *Colorado Republican*, 533 U.S. at 462 (exclusive reliance on "earmarking" ban "ignores the practical difficulty of identifying and directly combating circumvention under actual political

conditions"). Moreover, the Court has readily accepted the conclusion that Congress acted in order to prevent circumvention of the statutory contribution limits, even where the evidence of such intent has been less clear-cut than in the present case. See *id.* at 457 n.19.

Congress's adoption of an anti-circumvention rule is entitled to particular deference where, as here, a more individualized approach had been tried and found wanting. Before BCRA was enacted, Federal Election Commission (FEC) regulations permitted minors to contribute to candidates and political committees if, *inter alia*, "the decision to contribute [was] made knowingly and voluntarily by the minor child." 11 C.F.R. 110.1(i)(2). That standard, however, proved difficult to enforce in practice. Because contributors to candidates or political parties are not required to disclose their ages, potentially suspect contributions often could not readily be identified. See Kollar-Kotelly op. 611-612. "The evidence also shows that when the FEC has discovered donations given by young children which raised suspicions, their investigations were stymied by the refusal of parents to allow interviews, constitutional privacy concerns, and parental and legal counsel influence." *Id.* at 612. In explaining the need for a categorical rule, Senator McCain observed that the FEC had "notified Congress of its difficulties in enforcing the current provision." 148 Cong. Rec. at S2145; see *id.* at S2146 (Senator McCain notes that "the existing, more limited, FEC regulation has failed to prevent" circumvention of contribution limits). Although Section 318 goes further than the legislative proposal previously advanced by the FEC, see *id.* at S2148 ("The commission recommends that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf."), the agency's experience supports Congress's judgment that a prophylactic rule is necessary, and it

belies appellees' suggestion that prior law adequately addressed the danger of circumvention.

2. Appellees' demand for more precise tailoring is particularly unwarranted in light of the nature of the classification involved here. The line between minority and adulthood is routinely used to determine eligibility for the exercise even of fundamental rights (see pp. 2-3, *supra*), without the need or opportunity for individualized inquiry into a particular minor's qualifications. Indeed, Section 318 is if anything *more* closely tailored to the relevant government interest than are many other age classifications (*e.g.*, laws categorically forbidding minors from serving on juries) of unquestioned validity. Age is at best a rough proxy for maturity or judgment, but status as a minor is (as a result of background legal principles that are unchallenged here) a highly accurate standard for identifying those persons who are legally subject to the direction of others. Cf. *Vernonia Sch. Dist.*, 515 U.S. at 654 (noting that unemancipated minors "are subject, even as to their physical freedom, to the control of their parents or guardians.").

Although an individual minor child may be *allowed* by his parents to make campaign contributions based on the child's own political preferences, minors have no *right* to alienate property free from parental control, and as a class they are consequently much more susceptible than are adult donors to exploitation as conduits for unlawful contributions. The distinct legal status of minors fully supports Congress's determination that "allowing them to contribute to candidates [and political parties] presents too great a risk of abuse," 148 Cong. Rec. at S2146 (Sen. McCain), notwithstanding the limited evidence of instances of proven circumvention. Cf. *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the

justification raised."). Moreover, Congress's judgment is further supported by restrictions on the franchise itself. While individuals who are unable to vote may nonetheless have a significant interest in associating themselves with a particular candidate, Congress may recognize their disability from voting as a factor in identifying minors as a class of persons who are particularly susceptible to misuse as conduits for campaign funds.[3]

3. Even as applied to individuals whose intended campaign contributions are in fact free from parental coercion or control, Section 318 imposes minimal burdens on minors' rights of political expression. As Senator McCain emphasized, Section 318 leaves minors "free to volunteer on campaigns and express their views through speaking and writing." 148 Cong. Rec. at S2146. Minors may also contribute to candidates for state office (subject to applicable state laws) and to non-party political committees. Section 318 prohibits minors from employing only a single mode of

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[3] It could not reasonably be argued that babies or toddlers are capable of knowingly and voluntarily making campaign contributions (or that such children are typically given exclusive control over substantial monetary assets). Congress therefore must surely have authority to identify *some* age below which individuals will be barred from contributing money to candidates or political parties. "[W]hen it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless [the Court] can say that it is very wide of any reasonable mark." *Buckley*, 424 U.S. at 83 n.111; see *id.* at 30 (Congress's choice of an appropriate contribution limit is entitled to judicial deference). Congress's decision to draw the line at age 18 is wholly reasonable, given that (a) 18 is the age at which individuals in virtually all States acquire legal capacity to make contracts and dispose of property, (b) even 17-year-olds remain legally subject to the direction of their parents and are thus substantially more susceptible to exploitation for conduit contributions than are 18-year-olds, and (c) the Constitution itself distinguishes between 17- and 18-year-olds with respect to the right to vote.

political expression—namely, "the undifferentiated, symbolic act of contributing," *Buckley*, 424 U.S. at 21, to a federal candidate or political party. Section 318's ban on contributions to specific candidates for whom minors cannot legally vote thus leaves open numerous avenues for minors to impact the underlying issues that may be affected by the election. In light of the longstanding general restrictions on the ability of minors to enter into contracts, to dispose of property, and to vote (see pp. 2-4, *supra*), a law targeted solely at transfers of money does not significantly burden any right that minors have traditionally been understood to possess.[4]

C. Summary Affirmance Is Inappropriate

Appellees identify no case in which this Court has summarily affirmed a lower court decision striking down a provision of an Act of Congress. Respect for a coordinate Branch strongly suggests that such a course would be appropriate, if at all, only in extraordinary circumstances. Although appellees assert that the relevant constitutional principles are "well-settled in the precedents of this Court" (Mot. to Aff. 1), they cite no decision that has recognized a constitutional right for minors to transfer money or property under any circumstances, let alone a right to contribute to a candidate or political party. Nor do they identify any case in which this Court has invalidated a federal restriction on

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[4] Although Section 318's absolute ban on campaign contributions by minors is concededly more burdensome than a limit on the amount that may be contributed, Congress has categorically prohibited contributions by other categories of potential donors as well. See 2 U.S.C. 441e (foreign nationals). A contribution ban that applied to an unduly broad category of potential donors might threaten the distinct First Amendment interests of candidates and parties in "amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21; see *Shrink Mo.*, 528 U.S. at 397. Appellees do not and could not plausibly maintain, however, that Section 318 is likely to have that effect.

contributions to candidates or political parties. Quite apart from the reasons set forth above for sustaining Section 318 against constitutional attack, the absence of squarely controlling precedent in appellees' favor is by itself a sufficient basis for denial of appellees' motion.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

MALCOLM L. STEWART
GREGORY G. GARRE
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